Tim Foley Plumbing Service, Inc. *and* Indiana State Pipe Trades Association and U.A. Local 661, AFL–CIO. Cases 25–CA–25652, 25–CA–25730, and 25–RC–9699

December 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On August 3, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering brief to the other party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified.[2]

1. The judge found that the Respondent, a plumbing services company, violated Section 8(a)(3) and (1) of the Act when it refused to consider and hire six applicants who filled out applications en masse at the Respondent's offices on August 22, 1997, and changed its hiring policies and practices for the purpose of excluding union applicants. The judge ordered the Respondent to consider the applicants and hire and provide backpay to those it would have hired, leaving the latter issue to compliance. In its exceptions, the Respondent contends that it had a legitimate business reason for using temporary workers to fill its job requirements following the "salting" attempt and that the applicants were not sincere in wanting to work for the Respondent. The General Counsel excepts to the judge's failure to rule on the complaint's failure-to-hire allegations, which the judge deferred to compliance proceedings.

We agree with the judge's findings that the Respondent refused to consider the six applicants based on the applicants' union affiliation.[3] The judge's analysis of the refusal-to-hire allegation, however, does not comply with the framework recently set forth in *FES*, 331 NLRB No. 20 (2000), for analysis of refusal-to-hire violations. Thus, we will remand this aspect of the case to the judge for further consideration of the refusal-to-hire allegation in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.[4]

2. The Respondent excepts to the judge's finding that Kenneth (Richey) Harper is a supervisor under Section 2(11) of the Act and that his actions during the course of the campaign can be imputed to the Respondent.[5] Contrary to the judge, the Respondent contends that all decisions, no matter how routine, were made directly by Foley and merely communicated by his "extensions" on the jobsites and that Harper thus never exercised independent judgment in directing the work of employees. We need not pass on the supervisory status of Harper. Rather, we find that Harper's actions during the campaign can be imputed to the Respondent on the ground that Harper, as an admitted "extension of Foley," was an agent of the Respondent.

The Board applies common law principles of agency when examining whether an employee is an agent of the employer in the course of making a particular statement or taking a particular action. Under those principles, the Board may find agency based on either actual or apparent authority to act for the employer. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to be-

[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent's agent, Stephen LePage, did not threaten employees with loss of benefits by telling employees that if the Union won the election he would caution the Respondent not to give loans to employees without bargaining with the Union. There is no evidence that the Respondent's loan program was anything but discretionary. It is well settled that in the absence of a past practice, an employer is obligated to bargain with the union over terms and conditions of employment. See *Garrett Flexible Products*, 276 NLRB 704, 706 fn. 4 (1985). In light of the Respondent's substantial discretion as to when and whether to make loans to its employees, LePage's statement to employees at the meeting was an accurate statement of its bargaining obligations if the Union won the election, and, accordingly, did not violate Sec. 8(a)(1).

[2] In view of the fact that we are remanding portions of this case to the judge for further consideration, we will not issue a final Order at this time pending the judge's supplemental decision.

[3] It is evident that the Respondent was aware of the applicants' union activities. Each applicant wrote "voluntary union organizer" on the top of his application and many wore union T-shirts, jackets, and other paraphernalia. In addition, the Union's business agent accompanied the applicants to the Respondent's offices.

[4] The judge's finding that Fortwengler, Slentz, Small, Smith, Stockton, and Salmon were unlawfully denied consideration comports with the standard set forth in *FES*. Remand of his refusal-to-consider findings is therefore unnecessary.

[5] The judge found that Harper interrogated employees as to their union sympathies, promised unspecified benefits, threatened employees with the closing of the business or other unspecified reprisals if they selected union representation, and informed employees that it would be futile to select the Union as their bargaining representative and that the Respondent would never sign a contract with the Union. The Respondent does not except to the facts as found by the judge; the Respondent excepts only to the finding that Harper's actions can be imputed to the Respondent on the ground that Harper is a supervisor.

lieve that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp*., 315 NLRB 725 (1994), and cases there cited. See also *Alliance Rubber Co*., 286 NLRB 645, 646 (1987). Under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to the other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

Here, as noted above, Foley described Harper as an "extension of [him] at the job site." Moreover, many employees testified, without contradiction, that they were told by Foley to report to Harper at a particular jobsite and direct all questions and problems to him. The employees could reasonably believe, therefore, that when Harper made statements concerning actions that the Respondent was likely to take if a union were brought in, he was transmitting management's views and that Harper was just an additional spokesmen for management's view of the organizing campaign. Under all these circumstances, we find that Harper's statements, on the basis of which the judge found violations of Section 8(a)(1), are properly attributable to the Respondent. See *Poly-American, Inc*., 328 NLRB 667 (1999) (agency status of leadmen and junior foreman); *Great American Products*, 312 NLRB 962, 962–963 (1993) (agency status of employee Frias).[6]

3. The General Counsel excepts to the judge's dismissal of an allegation that Jeffrey Payne, an electrical contractor and friend of Foley, impliedly threatened unspecified reprisals against employees because they wore union T-shirts. Foley invited Payne to speak to employees at a captive audience meeting during the campaign. During the meeting, Payne pointed to two employees who he recalled had worn union T-shirts to an earlier representation hearing and said they were silly for letting the Union dress them up and that they looked like targets. The judge found that Payne was an agent of the Respondent but that the remark was ambiguous and did not imply a threat of retaliation. We find, contrary to the judge, that the threat by Payne constitutes a warning to the employees that they will be "target[ed]" by the Respondent because of their support for the Union.

The judge credited the testimony of employee Baker concerning this incident and it is that testimony on which we base our finding. Under direct examination, Baker testified that:

> [Payne] pointed Rich Howard and myself out, that the union made us go down there and he made comments of, again, I don't know word for word what he said, but we were kind of silly for letting the union push us around and dressing us up in those shirts and making targets out of us, really.

The record shows that Payne accompanied Foley to the representation hearing in August 1997, and spoke at the September captive audience meeting at Foley's request. Payne's remark was made to a room full of employees, in Foley's presence, and directed at two employees who had attended the hearing in support of the Union. Those employees were singled out for derision for no reason other than that they openly supported the Union. The message to everyone at the meeting was clear—if you show support for the Union, you will become a target for reprisal—and we find that the remark violated Section 8(a)(1). See, e.g., *Stein Seal Co*., 237 NLRB 996, 996 (1978), enfd. in pertinent part 605 F.2d 703, 705–706 (3d Cir. 1979) (Board reversed judge and found that employer's remarks to a leading union supporter during a captive audience meeting that one does not give more food to an "ungrateful dog" after being bitten once, left the impression with the audience that union supporter was ungrateful and that this union supporter and other employees who supported the union would be treated differently).

4. We agree with the judge that the violations committed by the Respondent and its agents during the course of the campaign warrant setting aside the election. In view of the fact that we are remanding the case to the judge for consideration of the refusal-to-hire allegation under the *FES* framework, we shall not order a second election at this time. Rather, we shall also direct the judge to reconsider the propriety of a *Gissel*[7] bargaining order in light of our decision here and his findings on remand regarding the refusal-to-hire allegations. Indeed, the judge's supplemental findings could impact the complement of employees eligible to vote in a second election or bear on

[6] We also find that the Respondent violated Sec. 8(a)(1) when, in conversations on two separate occasions, Harper (1) told employees on August 18, 1997, that they would have to supply their own tools and drive to work in their own trucks if the Union won the election, and (2) told an employee on September 15, 1997, that he would only work 6 months out of the year when the evidence shows that the Respondent's practice was to keep employees year-round. The judge credited the employees' versions as to these conversations. We agree with the General Counsel that the judge's failure to discuss these additional violations was inadvertent and we shall correct the findings. We need not, however, supply an additional remedy for the August 18 threats as they are encompassed in the threat to reduce wages and other benefits already remedied.

We need not pass on the supervisory status of John Adams in view of the fact that no allegations of unfair labor practices or objectionable conduct pertain to him and because the parties have agreed not to open and count his or Harper's challenged ballots.

[7] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

the Respondent's continuing propensity to violate the Act.[8]

ORDER

It is ordered that this case is remanded to Administrative Law Judge Arthur J. Amchan for further consideration, consistent with the above decision.

Joanne C. Mages, Esq., for the General Counsel.
Ray Blankenship, David Crittenden and *Steven LePage (R. T. Blankenship & Associates)*, of Greenwood, Indiana, for the Respondent.
William R. Groth, Esq. (Fillenwarth, Dennerline, Groth & Towne), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. These cases were tried in Muncie, Indiana, from May 18–21 and from June 1–3, 1998. They arise from unfair labor practice charges and objections to an election that was conducted on September 18, 1997, to determine whether Respondent's plumbing employees wished to be represented by Local 661 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry. The Union filed objections to the election on September 18. The unfair labor practice charges were filed by the Union on September 25 and November 7, 1997,[1] and the complaint was issued April 24, 1998. On May 8, 1998, the objections to the election were consolidated for hearing with the unfair labor practice charges.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Tim Foley Plumbing Service, Inc., a corporation, provides plumbing services from its facility in Muncie, Indiana, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Prelude to the Filing of a Representation Petition

The Union, Local 661 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, commenced a campaign to organize Respondent's plumbing employees in January 1997. Over the next several months it obtained authorization cards from a number of Respondent's plumbers.[2] In June, Ken Lewis, the business manager of Local 661, met with Respondent's owner, Tim Foley, on two occasions to encourage Foley to enter into a collective-bargaining relationship with the Union. Foley declined the offers. By early August, Foley was aware of the Union's organizing campaign. On August 12, the Union filed a petition with the NLRB, which it also presented to the Respondent, asking for recognition as the exclusive bargaining agent of Foley's plumbing employees.

The Salting Attempt by the Union

On August 22, six Local 661 members, each of whom was a licensed journeyman plumber (as well as pipefitter), accompanied Business Agent Jack Neal Jr. and organizer Tony Bane to Respondent's offices about midday.[3] Neal and the six plumbers, all of whom wore union T-shirts and some who wore union hats, entered the office, which became crowded with them inside. They asked Respondent's receptionist, Samantha Stauffer, for employment applications. Stauffer, who was very new on her job, couldn't find them. She went upstairs to consult with Michelle Miller, Respondent's office manager. Miller came downstairs and passed out applications to all the union members except Neal. Neal did not request an application.

Some of the applicants did not have a pen or pencil. Stauffer and/or Miller loaned one or more applicants a writing utensil. Other applicants went to their trucks to obtain one. Neal and/or one or more of the applicants asked questions of Miller and Stauffer, including what parts of the applications had to be completed, how long the applications were good for, who reviewed them, when they would be notified if they were going to be offered jobs, the amount of business Respondent had ongoing and where the Company's licenses were displayed. As advised by either Neal or Bane, each of the six plumbers wrote "voluntary union organizer" on the top of their employment application. Each asked for and received a copy of their application, also in accordance with directions given by Neal or Bane. After about 15 minutes at Respondent's office, the applicants and Neal left.

Four of the union applicants were unemployed on August 22; the two others, Gregg Slentz and Daniel (Steve) Small, were employed and filed applications during their lunchbreak. Stacy Stockton, who received his Indiana journeyman plumber's license in April 1997, had applied for employment at Respondent's office in May 1997, apparently without any encouragement to do so from the Union. He had been off of work for about 6 months in August. During this time period he had applied for employment, on his own, with two other nonunion plumbing contractors as well as with several nonplumbing employers.

Denny Smith, a journeyman plumber and pipefitter, had also been unemployed for a while when he went to Respondent's office on August 22. Since joining the Union, Smith has worked for one nonunion contractor for a period of about 2 months. He did so with the Union's permission. Within the year of his application to Foley, Smith also applied for a nonunion pipefitter's job at Delco Corporation.

[8] In view of the remand, we shall hold this case and issue a final Order only after receipt of the judge's supplemental decision.

[1] All dates are in 1997 unless otherwise indicated.

[2] Foley also employs carpenters, warehouse employees, and office clericals.

[3] Each of these applicants had experience in plumbing installation during the construction process. Some, but not all, had experience in residential or service plumbing work.

James Salmon had been laid off by a union contractor sometime before August 22. While on layoff he applied for work with a number of employers other than Respondent. At the time of the hearing in this matter, Salmon was employed in a nonunion plumbing job at Ball State University, earning $17 per hour, below union scale.

William Fortwengler had been unemployed since July. During a period of layoff between July and October, Fortwengler applied for work with several employers.

During the time the union applicants were at Foley's office, Miller and Stauffer were the only company employees present. The rest of Respondent's office staff were at lunch. Respondent's telephone rang during this period with calls from customers and employees. These calls were answered primarily by Stauffer, while Miller took care of the applicants. Respondent contends that the applicants were rude and disruptive. I conclude that this has not been established. The primary motive of Bane and Neal, and possibly some of the applicants was to organize Respondent. This was made patently clear to Miller and Stauffer by the wearing of union paraphernalia and writing "voluntary union organizer" at the top of each application. Bane was also concerned that Tim Foley would hire antiunion employees, who might tip the balance against the Union in the upcoming representation election.

Miller was aware that a representation petition was filed and that her employer had retained R. T. Blankenship & Associates, labor consultants, to advise and assist him in his campaign against the Union. She was preconditioned to perceive the union applicants as rude and disruptive. Indeed, she concluded that they had "an ulterior motive" from the fact that the applicants showed up at the same time wearing union T-shirts. Stauffer was apparently nervous during this period because she couldn't find the employment applications and because "big burley guys always seem to intimidate me."

When Tim Foley returned from lunch, Miller gave him the six union applications. He told her to contact Stephen LePage, an employee of Blankenship. After consultation with LePage, Respondent, on August 23, posted a notice on its door stating that it would no longer accept employment applications at its office. Applicants were directed to apply through the Muncie office of Indiana Workforce Development, a state agency which administers Indiana's unemployment insurance system and provides a labor exchange for employers and prospective employees. Respondent concedes that the notice was posted in reaction to the visit by the union applicants and was put up to prevent a recurrence of such a visit.

Job applicants may apply to a prospective employer through Indiana Workforce Development only if the employer places a job order with the agency. Respondent did not place such a job order in August. It did not do so until November 17.[4] Until that time there was no way a job applicant could apply for a job with Tim Foley Plumbing through Indiana Workforce Development.

Respondent never contacted any of the union applicants. Tim Foley received the applications and gave no consideration to any of them. During the late summer and early fall of 1997 Respondent was unusually busy. It had 10–12 new projects in progress at the same time. These included installation of the plumbing at several motels, several assisted living projects, and apartment complexes, which were under construction. On August 11, Foley hired Larry Swallow, a tenant and handyman at a property owned by him. On August 14, Foley hired John Hobson. Both new employees were hired to do plumbing work and are members of the bargaining unit.

After hiring Hobson, Respondent did not directly hire any plumbing employees again until November 24. Instead, Foley fulfilled his labor needs entirely through temporary labor agencies and the use of subcontractors. Tim Foley considers employment applications to be active for a period of 30 days. In the 30 days following receipt of the union applications Respondent utilized the services of the following journeymen plumbers through Tradesman, a temporary labor agency:

Lee Hiles: from August 25 to February 12, 1998
Bill Conn: from August 29 to September 18, 1997
Richard Hilligoss: from September 10 to March 20, 1998

Foley paid Tradesman between $20.52 and $27.33 per hour for these plumbers. Respondent also employed Robert Richards from National On-Site Personnel on September 11 for $22.87 per hour. In addition, Respondent used the services of a number of apprentices and helpers during this period through the Labor Ready employment agency. Respondent had used temporary labor services previously. However, prior to August 25, 1997, it had not done so since 1995, with one exception.[5] Moreover, Respondent's use of temporary employees in the fall of 1997 appears to be unprecedented, even in comparison with 1994 and 1995.

After November 24, Foley resumed its direct hiring of plumbers, including five journeymen in late 1997 and early 1998.[6] The three journeymen hired in 1998 were employed through Workforce Development.

The Election Campaign

On August 28, Respondent and representatives of the Union met at the NLRB offices in Indianapolis to participate in a representation hearing. Two bargaining unit members who attended, Bob Baker and Richard Howard, wore union T-shirts. On August 29, the parties entered into a stipulated election agreement. Among the stipulations were that the election would be held on September 18, and that employees on the payroll as of Sunday, August 24, would be eligible to vote. The appropriate collective-bargaining unit was described as:

[4] I credit the testimony of Indiana Workforce Development Supervisor Randall Ziegler over that of Respondent's office manager Michelle Miller.

[5] Foley was in contact with at least two of these agencies on August 21 and early on August 22, prior to the arrival of the "salts" at his offices.

[6] Four of Respondent's employees, who were union supporters, went on strike on October 3. Richey Harper resigned his employment in October. However, Respondent does not claim that its direct hiring after November 24 was undertaken to replace the strikers or Harper. Indeed, Foley did not seek plumbers through Workforce Development until November 17, at least 6 weeks after the strike began.

> All plumbers, apprentice plumbers, and plumber helpers, BUT EXCLUDING all carpenters, carpenter helpers, office clerical employees, and all guards and supervisors as defined in the Act.

The parties named 21 of Respondent's employees in the stipulation and provided that:

> The above listed employees of the Employer are agreed to be the only employees eligible to vote . . . in the election . . . and with the exception of John Adams and Richey Harper, Jr., the parties agree that by signing this list they are making disposition of all questions of eligibility and this resolution is final and binding on them.

Alleged Unfair Labor Practice by Tim Foley

Paragraph 5(e) of the complaint alleges that on or about the week of September 15, Tim Foley threatened employees with unspecified reprisals because they formed, joined, and assisted the Union. Union supporter Richard Howard alleges that just before the election, Owner Foley confronted him with his timecard. Foley and Howard argued as to whether Howard could be paid for the time spent driving a company vehicle to a project in Frankfort, Indiana. Howard alleges that Foley said he would have to pay Howard for his driving time until the election but that afterwards there would be repercussions. Foley denies this and contends that he told Howard that in a union setting employees would drive their own vehicles to work and the issue of being paid for travel time would not arise. I credit Foley's testimony in this regard.[7] However, as discussed below, I agree with the General Counsel that Foley's remarks violated Section 8(a)(1).

Alleged Unfair Practices in the Period Between the Filing of the Petition and the Election by Richey Harper

During the first few weeks following the filing of the Union's petition, Richey Harper, who was in charge of several of Respondent's jobsites, discussed the Union with apprentices Chris Brown, Scott Mitchell, and journeyman Richard Howard. Harper told Brown and Mitchell that if Respondent was unionized, apprentices would be paid about $7.50 per hour. At the time Brown was making $12.50 per hour and Mitchell $9. Harper also inquired how they would vote and tried to elicit information from Brown and Mitchell as to how others would vote.[8] Harper told all three employees that Tim Foley would never sign a collective-bargaining agreement with the Union. He also told them that Foley might sell the company tools and trucks, or shut down completely in order to avoid unionization. Howard and Mitchell discussed their conversations with Harper with other bargaining unit employees.

Finally, Harper told Mitchell that Tim Foley would "be looking out for" those employees who voted against the Union. Harper also visited Chris Brown at his home just prior to the election. He again asked Brown how he would vote and sought information as to how other employees would vote. The parties disagree as to whether Harper was a supervisor or an agent of Tim Foley Plumbing, and thus disagree whether his conduct is imputable to Respondent. This issue is addressed later in this decision.

The Company's Campaign Meetings

Respondent held three meetings for employees just prior to the election in an effort to convince them to vote against the Union. Stephen LePage, an employee of R. T. Blankenship & Associates, conducted the first two meetings. At the first meeting LePage emphasized to employees that they did not have to vote for the Union if they signed an authorization card. At the second meeting, he primarily focused on the Union's constitution. At one of the meetings LePage discussed Tim Foley's practice of loaning money to his employees. LePage said:

> [I]f Tim called me and said Employee A wanted a loan, that I would probably advise him not to give it to them and we would need to talk with the union about it.

Tr. 1062.[9]

At the last of the company campaign meetings, Tim Foley invited Jeffrey Payne, a friend and electrical contractor, to talk to Respondent's employees. Payne, who also accompanied Foley to the representation hearing in August, discussed his experiences many years ago in trying to organize his employer and recent efforts by the IBEW to organize his company, Electrical Specialties, Inc. (ESI). During his talk Payne recalled seeing two Foley employees wearing union T-shirts at the NLRB representation hearing. Payne said they were silly for letting the Union dress them up and that they looked like targets.[10]

The Election

The representation election was conducted at Respondent's warehouse on September 18. Prior to that date the Union had obtained authorization cards from 12 of the 19 employees that both parties agree were in the bargaining unit. The last of the cards was signed on September 2. They read, in pertinent part, as follows:

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[7] However, I credit Howard's testimony that he discussed this conversation with employees Baker, Brown, and Mitchell, all of whom were union supporters.

[8] These allegations are unrebutted. Harper quit in October 1997, possibly on less than amicable terms with Tim Foley. I therefore draw no inference from Respondent's failure to call him as a witness. Brown, Mitchell, and Howard are union members on strike from Respondent and are, therefore, not impartial witnesses. Nevertheless, I find their allegations regarding Harper credible.

[9] Some witnesses testified that LePage said simply that if the Union won he would advise Foley not to give employees loans. However, I credit LePage's testimony that he also said that Respondent would have to talk to the Union about giving such loans. In this regard I note that Scott Mitchell, a union supporter, testified that LePage "said that he [Foley] wouldn't be able to do favors like that anymore because he would have to go through the union before he could do anything like that" (Tr. 540).

[10] Payne concedes that he commented disparagingly about seeing Foley employees wearing blue T-shirts which had the union symbol or logo on the front and back. The design on the back of the shirt apparently contains a check mark. The parties dispute what he said and when he said it. Payne says that during a break at the representation hearing he told two employees that he couldn't believe they were letting the Union dress them up like clowns.

> The signing of the attached card will permit the United Association or one of its locals to seek to bring you the benefits of our union in a collective bargaining agreement.
>
> Authorization for Representation Under the National Labor Relations Act
>
> I, the undersigned employee of the (company name) employed as (occupation or job description) at (city, State, location or project), hereby authorize Local Union No. __ of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, affiliated with the AFL–CIO, or its agent, or representatives, to represent me in collective bargaining negotiations on all matters pertaining to rate of pay, hours or any other condition of employment.

There is no credible evidence that anything was said to any of the card signers which was calculated to direct the signer to disregard and forget the language above his signature.[11] Ten employees voted against the Union and nine voted for it. The Union challenged the ballots of John Adams and Richey Harper on the grounds that they were supervisors. They did not vote.

Analysis

Respondent Violated Section 8(a)(1) and (3) in Refusing to Hire and to Consider for Hire Six Union Members who filed Employment Applications with it on August 22, 1997

Discrimination in refusing to consider applications for hire on the basis of union membership or activity is discrimination in regard to hire within the meaning of Section 8(a)(3). Such discrimination is proved by showing that (1) the employer is covered by the Act; (2) that the employer at the time of allegedly illegal conduct was hiring or had concrete plans to hire; (3) that antiunion animus contributed to the decision not to consider, interview or hire an applicant; and (4) that the applicant was a bona fide applicant, *NLRB v. Ultrasystems Western Contractors*, 18 F.3d 251, 256 (4th Cir. 1994), enf. in part denying enf. in part and remanding *Ultrasystems Western Contractors [I],* 310 NLRB 545 (1993), quoted in *Ultrasystems Western Contractors [II]*, 316 NLRB 1243 (1993). Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), the General Counsel must show that antiunion sentiment was a substantial factor in the employer's decision. If he does so, the employer must prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

In the instant matter, Respondent does not dispute that it was covered by the Act. The record shows that it hired a number of employees soon after the union members applied for employment, albeit through temporary labor agencies. The General Counsel has also established that the six union members were bona fide applicants. All were experienced licensed plumbers as well as pipefitters.[12]

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence, *3E Co.,* 322 NLRB 1058, 1062 (1997). I infer animus and discriminatory motivation in the instant case. It is undisputed that Tim Foley knew the applicants were union members who intended to assist the organizing drive then under way in his company. The Union made sure he knew that by having the applicants dress in union T-shirts and writing "voluntary union organizer" on the top of their applications. Foley's decision to stop accepting employment applications at its office was made to prevent a repetition of the August 22 incident and is direct evidence of antiunion animus.

I infer animus and discriminatory motivation from Respondent's sudden, temporary, and exclusive reliance on temporary labor agencies and subcontractors for all its manpower needs. Although Foley had used such agencies in the past, it has not done so, with one exception, for over a year and half prior to the arrival of the salts. After a few months of relying exclusively on temporary agencies and subcontractors, Foley Plumbing went back to the direct hire of experienced plumbers. I conclude that its decision not to directly hire any employees between August 22, and late November was made so it could avoid hiring any union supporters and to provide a defense to the unfair labor practice charges it expected to be filed.[13] Therefore, I find that the General Counsel has met its burden of establishing the violation of Section 8(a)(1) and (3) alleged in paragraph 6 of the complaint.

Respondent has not proffered an affirmative defense other than that it could spare itself significant administrative costs by using temporary labor agencies and that it wanted to avoid layoffs in the future. However, Foley has offered an insufficient explanation as to why these advantages became determinative for all its hiring decisions between August 22 and November 24, when they were outweighed by other considerations both before and after this period. I therefore reject as pretextual Respondent's assertion that the alleged discriminatees were not hired or considered for hire because Foley was utilizing only employees of temporary labor agencies, without any discriminatory motive. Although Respondent was in contact with some of these agencies on the day before the union applicants came to its office, it was already aware of the organizing campaign and may well have anticipated a "salting" attempt.

Respondent Violated Section 8(a)(1) in Changing its Hiring Policies by Requiring Applicants to Apply Through Indiana

[11] Two card signers, Mike Licht and Scott Chambers, who still work at Tim Foley Plumbing, testified for Respondent. Even if I found their testimony regarding the circumstances under which they signed their cards completely credible, I would find that the union representatives did not mislead them as to the purposes of the card. Moreover, I find that their recollection of the card signing was selective in a manner calculated to mollify Tim Foley.

[12] Respondent contends the six were not protected by Sec. 7 because they were "salts," a notion rejected by the Supreme Court in *NLRB v. Town & Country Electric,* 116 S.Ct. 450 (1995). Respondent's contention that these applicants merely wished to trap Respondent into committing unfair labor practices is completely unsupported in this record. Moreover, assuming that this was part of their motivation in applying for work at Foley, they were still protected by the Act, *M. J. Mechanical Services,* 324 NLRB 130 (1997).

[13] Foley needed additional labor within the 30 days following the applications of the union salts. If he ignored the "salts" and hired plumbing employees directly, the General Counsel would have a more obvious prima facie case of discrimination.

Work-force Development after the Visit by the "Salts" on August 22

Respondent changed its hiring policy in response to the visit from the union applicants and to deter future salting efforts. It ceased accepting employment applications at its office and required applicants to go through Indiana Workforce Development. When an employer implements such a policy with the purpose of restricting or preventing employees from engaging in protected activity, Section 8(a)(1) has been violated, *Tulatin Electric,* 319 NLRB 1237 (1995).

The Indiana Workforce Development office in Muncie is sufficiently close to Respondent's office that the policy does not, at first blush, appear to impose any hardship on applicants. However, for almost 2 months after Respondent implemented this policy, it would have been impossible for an employee to apply for a job through Indiana Workforce Development because Respondent had not placed a job order with that agency. Moreover, the change was not an isolated violation of the Act, it was part of Respondent's effort to discredit the Union prior to the election. This effort included the refusal to consider union members for hire and the concerted effort to weaken the Union undertaken by Richey Harper, *Xidex Corp. v. NLRB,* 924 F.2d 245, 253 (D.C. Cir. 1991).

Tim Foley Violated Section 8(a)(1) by Telling Richard Howard that after the Election, Employees would be Driving their Own Vehicles to Jobsites, Rather than Company Vehicles as they had on Some Occasions in the Past

I conclude that Tim Foley's preelection conversation with Richard Howard regarding whether employees should be compensated for driving to jobsites in company vehicles violated Section 8(a)(1). The import of the remark was that if the Union won, Respondent would no longer allow employees to drive company vehicles to work, as they had at least in some instances. The use of these vehicles was a significant benefit to employees and Foley's remark constitutes a threat to withhold this benefit if employees selected the Union. Foley's remark to Howard is also consistent with threats made by Richey Harper to a number of employees.

Respondent did not Violate Section 8(a)(1) in September 1997 Through the Remarks of Jeffrey Payne

I have found that Jeffrey Payne, a fellow contractor, invited by Tim Foley to address Respondent's employees, and disparaged the Union and its supporters by saying that certain individuals were silly to let the Union dress them up and make them look like targets. I find that Payne was an agent of Respondent. However, his remark is somewhat ambiguous and does not imply a threat of retaliation by Respondent. I therefore dismiss the allegation of an 8(a)(1) violation by Payne.

Respondent by Kenneth R. (Richey) Harper Jr. violated Section 8(a)(1) as Alleged in Paragraph 5 of the Complaint

As alleged in paragraph 5, I have concluded that Kenneth R. (Richey) Harper Jr. threatened employees that their wages would be decreased if they selected the Union, interrogated employees about their union sympathies and the union sympathies of others, and told employees that Respondent would shut down or sell its equipment if they selected the Union and that employees who did not support the Union would be "looked out for," i.e., granted unspecified benefits. Harper also informed employees that selecting the Union would be futile because Respondent would never sign a collective-bargaining agreement.

Harper's statements are violations of Section 8(a)(1) only if they are imputable to Respondent. The General Counsel contends they are imputable because Harper was a supervisor; I agree. I also conclude that John Adams, whose eligibility to vote in the representation election was challenged by the Union, is a supervisor.

The Alleged Supervisory Status of Richey Harper and John Adams

Respondent concedes that its employees were told by Tim Foley to do what Richey Harper and John Adams told them to do and to direct any questions to Harper or Adams. However, it denies that Harper or Adams was a supervisor or an agent of Tim Foley Plumbing. Foley contends Harper was merely a journeyman and that Adams was merely an apprentice with an unusually wide range of skills. Tim Foley was on his company's jobs very rarely when his employees were performing plumbing work.[14] Respondent submits that Harper and Adams were merely two of several employees who were sometimes Tim Foley's "extension on the jobsite" when Foley was not present. However, Harper and John Adams differed from other Foley employees in a number of respects. Jobs that had progressed to the point where plumbing work was being done were usually supervised by either Harper or Adams. They both carried business cards identifying them as project managers of Tim Foley Plumbing. Owner Foley was aware they carried such cards.[15]

Although both Adams and Harper worked with plumbers' tools at times (estimated from 5 to 50 percent of the time by various employees with respect to different jobsites), their primary responsibility was insuring that the Company's work was done on time and properly. They spent most of their time watching other employees work, dealing with other contractors, and doing other nonmanual tasks. Adams, who was not a li-

[14] In July or August, Tim Foley began doing manual production work after some period of time in which he did not work with plumbing tools.

[15] In an employment verification form, Foley described Adams as "a plumbing supervisor over approximately 10 service plumbers." When another contractor in a letter of complaint about Adams described him as Foley's "field superintendent," Foley did not inform the contractor that its characterization was incorrect.

While Foley employees were working on a 6-month long project at the Autumn Ridge apartment complex in Anderson, Indiana, Adams conducted weekly tailgate meetings. Although Adams was not a licensed journeyman plumber, he checked the work of Respondent's journeymen and gave them work assignments.

Foley informed Scott Mitchell and Richard Howard that Harper was their supervisor. During Respondent's work at the Super 8 motel in Frankfort, Indiana, Harper, after talking to a motel representative, instructed an apprentice to move several bath tubs that the apprentice had already installed. Adams stopped by the Frankfort Super 8 one day and ordered two apprentices to come with him. He took the two to another job where he directed their work.

censed journeyman plumber, was Respondent's highest-paid plumbing employee, making $19.75 per hour in August. Adams had expertise in many different aspects of construction, which distinguished him from Foley's other plumbers. Harper was the second highest-paid plumbing employee at $18.50 per hour.

Bob Baker, a journeyman, was paid $17 hour. Several other journeymen plumbers were paid $15 per hour. Baker, other journeyman, and some apprentices were at times in charge of the projects on which they were working, but only if Harper or Adams were not present.[16] Moreover, there is no evidence that any employees other than Harper and Adams were in charge of more than one job at a time, or that any other employee exercised supervisory duties on a regular and substantial basis.

Section 2(2) and (3) of the Act defines "employee" broadly, with certain exclusions, one of which is "supervisors." Any party contending that a worker falls within the statutory exclusion of supervisors carries the burden of proof on that issue, *Adco Electric,* 307 NLRB 1113, 1120 (1992).

Pursuant to Section 2(11) of the Act, a supervisor is one who has authority to hire, transfer, suspend, lay off, recall, promote, assign, reward, discipline, or discharge other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not merely routine or clerical, but requires the use of independent judgment. *Providence Hospital,* 320 NLRB 717, 731–733 (1996), enfd. *Providence Alaska Medical Center v. NLRB,* 121 F.3d 548 (9th Cir. 1997); *Washington Nursing Home,* 321 NLRB 366 (1996).

Possession of one or more of these powers establishes supervisory status, if the exercise of this authority requires the use of independent judgment. In determining whether a worker is a "supervisor," however, one must keep in mind that there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's business and who incidentally direct the movements and operations of less skilled subordinate employees. These artisans have a close community of interest with their less experienced coworkers and the Board has consistently declined to deem them supervisors rather than employees, *Southern Bleachery & Prints Works, Inc.,* 115 NLRB 787, 791 (1956), enfd. 257 F.2d 235, 239 (4th Cir. 1958). Moreover, an employee who possesses supervisory authority during a sporadic and insignificant portion of his working time does not fall within the statutory definition of "supervisor," *Gaines Electric Co.,* 309 NLRB 1077, 1078 (1992).

I conclude that the General Counsel has established that Harper was a supervisor of Tim Foley Plumbing. Harper regularly and during a substantial portion of his working time at Foley exercised independent judgment in directing the work of other employees. He also exercised independent judgment in recommending the discipline of Respondent's employees. Therefore, statements made to employees by Harper that violated Section 8(a)(1) are imputable to Respondent.[17]

John Adams is also a Supervisor of Respondent

The General Counsel does not allege any statutory violations by John Adams. Adams' status is an issue as a result of the Union's challenge to his right to vote in the representation election. As with Harper, the General Counsel has established that Adams regularly and during a substantial portion of his working time at Foley exercised independent judgment in directing the work of other employees. The record also shows that Adams exercised independent judgment in transferring employees from one jobsite to another, or that he could effectively recommend such transfers to Tim Foley. He also could effectively recommend the disciplining of other employees.

Respondent did not violate Section 8(a)(1) by Stephen LePage's remark that Foley would not make loans to employees without consulting the Union, if employees selected the Union as their bargaining representative.

I conclude that Respondent did not violate the Act through LePage's statement that if employees selected the Union, he would advise Tim Foley not to loan money to employees without consulting the Union. LePage's statement explained a potential change in the relationship between Foley and his employees, that does not constitute a threat of reprisal, *Tri-Cast, Inc*., 274 NLRB 377 (1985); *Ben Venue Laboratories*, 317 NLRB 900, 901 (1995). Indeed, it might be inadvisable for Foley to continue to give loans unilaterally if his employees are represented by the Charging Party. Unilaterally giving loans to some employees and not others, for example, might expose Respondent to the potential allegations of discriminatory conduct.

Respondent's unfair labor practices between the filing of the representation petition and the election warrant setting aside the election.

The Board's policy is to set aside an election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. There is a limited exception to this policy, however, in situations where the misconduct is de minimis with respect to affecting the results of an election, *Video Tape Co*., 288 NLRB 646 fn. 2, 665 (1989). In the instant case Respondent committed several unfair labor practices during this critical period, some of which occurred just prior to the election. Several employees were aware of these violations and as the Union lost the election by only one vote, the violations cannot be deemed not de minimis; therefore I conclude that the Union's objections have sufficient merit to set aside the election of September 18.[18]

An order requiring Respondent to bargain with the Union is not warranted.

[16] For example, Mike Licht, who still works for Foley, testified that if he were in charge of a jobsite, he would communicate directly with Tim Foley. If, however, Adams were on the jobsite, Licht would communicate with Foley through Adams. Licht also testified that Adams did not perform manual labor.

[17] The fact that Tim Foley allowed Harper to carry a business card calling himself a "project manager," or that Foley sometimes referred to Harper as a supervisor is not dispositive of his status. The same is true with respect to Adams.

[18] Respondent's discriminatory refusal to consider the union salts for hire may also have influenced the outcome of the election. If two had been hired, they may have been eligible to vote and tipped the outcome of the election in the Union's favor.

The General Counsel seeks a bargaining order to remedy Respondent's statutory violations during the period between the filing of the representation petition and the election. Pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), there are two categories of cases in which the Board may issue such an order. "Category I" cases are those marked by outrageous and pervasive unfair labor practices. "Category II" cases are less extraordinary cases marked by less pervasive practices which still have the tendency to undermine majority strength and impede the election process.

I Conclude that the Instant Case satisfies neither the "Category I" nor "Category II" Criteria

To warrant the issuance of a bargaining order in "Category II" cases, (1) the union must have had majority support within the bargaining unit at some time; (2) the employer's unfair labor practices must have had the tendency to undermine majority strength and impede the election process; and (3) the possibility of erasing the effects of past unfair labor practices and ensuring a fair rerun election by use of traditional remedies is slight, and the once-expressed sentiment in favor of the union would be better protected by a bargaining order, *CWI of Maryland, Inc.,* 321 NLRB 698, 709–710 (1996), enfd. 127 F.3d 319, 333–334 (4th Cir. 1997).

The Union had the Support of a Majority of Employees in the Bargaining Unit as of August 18

By August 18, when Scott Chambers signed an authorization card, the Union had the support of 10 of the 19 members of the bargaining unit. By September 2, it obtained authorization from two more employees to represent them.

Respondent's Unfair Labor Practices had the Tendency to Undermine the Union's Majority Strength and Impede the Election process

Respondent's unfair labor practices, particularly the remarks made to employees by Richey Harper, had the tendency to intimidate employees, particularly the apprentice plumbers to whom they were directed. Moreover, they were disseminated to an extent throughout the small bargaining unit. These remarks thus had a tendency to undermine the Union's support. Tim Foley's refusal to consider union applicants for hire may have directly affected the outcome of the election process. If two union applicants had been hired they may have provided the margin of victory for the Union in the September 18 election.

It has not been Established that the Possibility of Erasing the Effects of Past Unfair Labor Practices and Ensuring a Fair Rerun Election by use of Traditional Remedies is Slight

The fact that Richey Harper, who committed many of the violations herein, no longer works for Respondent, weighs heavily in my conclusion that the effects of past unfair labor practices may be erased by traditional remedies. While Owner Tim Foley committed unfair labor practices by discriminating against the union "salts," by changing his employment application policy and threatening Richard Howard with loss of the use of company vehicles, these violations can be cured by remedies such as backpay, offering employment to "salts" who would have become Foley employees but for the discrimination, a return to the status quo ante with regard to employment applications and the posting of a notice.

Unlike many cases in which a bargaining order is issued, Foley did not discharge any union advocates either before or after the election. Although the refusal to hire union job applicants is a serious violation of employees' Section 7 rights, it is not clear that in this case it had a similar intimidating effect as a discriminatory discharge. Foley employees may not have appreciated the fact that the appearance of new temporary agency employees, and only temporary agency employees, on their jobsites from late August to late November, was motivated by a desire to avoid hiring union applicants.

CONCLUSIONS OF LAW

1. By threatening employees with the loss of wages and other benefits, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
2. By coercively interrogating employees about the union membership, activities, and sympathies of themselves and others Respondent violated Section 8(a)(1).
3. By threatening employees with closing the business if they selected the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1).
4. By indicating that employees who opposed the Union would be "looked out for," Respondent violated Section 8(a)(1).
5. By indicating that it would never sign a collective-bargaining agreement with the Union, Respondent violated Section 8(a)(1).
6. By refusing to consider for hire applicants William Fortwengler, Gregg Slentz, Daniel S. (Steve) Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon, since August 22, Respondent violated Section 8(a)(1) and (3).
7. By changing its hiring policies on August 22, by requiring employees to apply through Indiana Workforce Development, Inc., rather than at its offices, Respondent violated Section 8(a)(1).
8. Richey Harper Jr. and John Adams were, at all material times, supervisors within the meaning of Section 2(11) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider six applicants for employment, I shall order Respondent to consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct. In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of the six employee applicants, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Finally, if at the compliance stage it is established that the Respondent would have assigned any of these discriminatees to current jobs, Re-

spondent shall hire those individuals and place them in positions substantially equivalent to those which they would have been hired for initially.

I further recommend that the election held September 18, 1997, be set aside and that Case 25–RC–9699 be remanded to the Regional Director for Region 25 for purposes of conducting a new election at such time as he deems that circumstances permit a free choice of bargaining representatives.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Tim Foley Plumbing, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for hire applicants on the basis of their union affiliation or based on Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(b) Refusing to accept employment applications at its Muncie, Indiana office.

(c) Threatening employees with the loss of wages and other benefits if they select the Union as their collective-bargaining representative.

(d) Interrogating employees about their union membership, activities, and sympathies of themselves and others.

(e) Promising employees unspecified benefits if they did not support the Union.

(f) Threatening employees with the closing of the business or other reprisals if they select the Union as their collective-bargaining representative.

(g) Informing employees that it would be futile to select the Union as their collective-bargaining representative because Respondent would never sign a contract with the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole any of the following job applicants for any losses they may have suffered by reason of Respondent's discriminatory refusal to consider them for hire as determined in the compliance stage of this proceeding. Offer those applicants, who would currently be employed but for Respondent's unlawful refusal to consider them for hire, employment in positions for which they applied. If those positions no longer exist, Respondent must offer these applicants substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by Respondent:

William Fortwengler, Gregg Slentz, Daniel S. (Steve) Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Muncie, Indiana facility, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1997.[21]

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to consider for hire applicants on the basis of their union affiliation or based on our belief or

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[21] The first unfair labor practices committed by Richey Harper occurred about August 18.

suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT refuse to distribute or accept employment applications at our Muncie, Indiana office.

WE WILL NOT threaten employees with the loss of wages or other benefits or other reprisals if they support the Union.

WE WILL NOT interrogate employees about the union membership, activities and sympathies of themselves or others.

WE WILL NOT promise employees benefits if they reject the Union.

WE WILL NOT inform employees that it would be futile for them to select the Union by indicating that we would never sign a contract with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, those of the applicants named below who, as determined in an NLRB compliance proceeding, are found to have suffered economic loss as a result of our failure and refusal to consider them for hire:

William Fortwengler, Gregg Slentz, Daniel S. (Steve) Small, Denny R. Smith, Stacy L. Stockton, and James Salmon.

WE WILL offer those applicants listed above who would be currently employed by us, but for our unlawful refusal to consider them for employment, employment in positions for which they applied. If those positions no longer exist, we will offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

WE WILL notify in writing all applicants listed above that any future job application will be considered in a nondiscriminatory manner.

TIM FOLEY PLUMBING SERVICE, INC.